

7 Ukraine

A constitutional design between façade democracy and effective transformation?

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Introduction: democratization in Ukraine in 2004–2009

The process of the democratization of the Ukrainian society started after gaining independence in 1991.¹ Since then Ukraine has made significant progress towards achieving Western standards of democracy and civil society (see Table 7.1). Before 2004 the state of political development in Ukraine could be considered a ‘hybrid democracy’ with strong presidential power. Therefore the period of 1991–2004 bears a label of ‘kuchmism’, which emphasizes the strong influence of former President L. Kuchma (in power from 1996–2004) on political and economic life in Ukraine during that period.

Table 7.1 Major constitutional, legal and institutional reforms in Ukraine (1990–2010)

1990	Adoption of Law of Ukrainian Soviet Socialist Republic ‘On Local Councils of People’s Deputies of Ukrainian SSR and Local Self-Government’
24 August 1991	Adoption of Declaration of Independence of Ukraine
1996	Joining of the Council of Europe
28 June 1996	Adoption of the Constitution of Ukraine
18 October 1996	Establishment of the Constitutional Court of Ukraine
23 December 1996	Adoption of Law of Ukraine ‘On Verkhovna Rada Commissioner on Human Rights (Ombudsman)’
2004	Launch by the EU of the European Neighbourhood Policy
18 March 2004	Adoption of Law of Ukraine ‘On All State Programme of Approximation of Ukrainian legislation to EU Law’
8 December 2004	Signing constitutional amendments to resolve the ‘Orange Revolution’, move to the parliamentary republic
21 February 2005	Signing of the EU–Ukraine Action Plan
26 March 2006	Election of the Verkhovna Rada of Ukraine
2 April 2007	President V. Yushenko dissolves the Verkhovna Rada of Ukraine
30 September 2007	Election of the Verkhovna Rada of Ukraine
8 October 2008	President V. Yushenko dissolves the Verkhovna Rada of Ukraine
17 January 2010	Election of the president of Ukraine



1 The 'Orange Revolution' in 2004–2005 has drastically changed the political
2 environment in Ukraine. The dramatic victory of Victor Yushenko in the presi-
3 dential campaign in 2005 brought many hopes for an immediate transformation
4 of the hybrid regime to a regime of consolidated democratic in Ukraine.
5 However, contrary to the other post-socialist countries of Eastern and Central
6 Europe which have become full EU member states, Ukraine has not been able to
7 acquire sufficient internal conditions (traditions of representative democracy,
8 private property, the rule of law, etc.) to ensure the success of democratic trans-
9 formations and, consequently, to establish a consolidated type of democracy.

10 In the second half of 2004, when the presidential election campaign started,
11 Ukraine entered into a permanent political crisis. Eventually this crisis has grown
12 into a crisis of political elites and finally into a crisis of the entire political
13 system in Ukraine. This situation reveals the lack of effective instruments of for-
14 mation, institutionalization and coordination of political elites' interests in
15 Ukraine as well as lack of parliamentary and democratic traditions among the
16 Ukrainian political elite.

17 The political crisis in Ukraine was caused by several closely inter-related
18 internal factors: (a) confrontation between two political powers having a very
19 different understanding of internal and external priorities (one is the 'pro-
20 Western democratic force' represented by the pro-presidential party 'Our
21 Ukraine' and the 'Block of Julia Timoshenko' which, however, did not manage
22 to acquire solid institutional bases of unity and mechanisms of cooperation: the
23 other is the 'pro-Russian' 'Party of Regions' with considerable financial support
24 from top Ukrainian oligarchs). These powers emphasized a growing split
25 between the national political elites based on regional differences in Ukraine. (b)
26 Institutional crisis of the Ukrainian political system and weak electoral and inter-
27 institutional accountability, which is a direct consequence of hurried and there-
28 fore immature 'constitutional reform' initiated in December 2004.

29 The forthcoming presidential elections in 2010 help to explain the continuing
30 saga of political conflicts in Ukraine. Political elites in Ukraine have entered into
31 a struggle to get as many advantages as possible before the elections in 2010.
32 Another factor explaining recent political instability in Ukraine is the fact that
33 the existing political system (parliamentary–presidential) was conceived as a
34 temporary one as a response to the 'Orange Revolution' in 2004. Hitherto the
35 model of 'hybrid democracy' has not exhausted itself in Ukraine. All leading
36 principal political actors have a clear incentive to return to a consolidation of the
37 political regime on the basis of hegemony of the parliamentary–presidential
38 system. At this point the model of 'hybrid democracy' suits major political
39 players in Ukraine since it helps them in their fierce struggle for political power.

40 The result of an assessment of the current situation of democratic freedoms in
41 Ukraine is ambiguous. Foreign political analysts and journalists often speak
42 about existence of a right to freedom of speech, the absence of censorship and
43 limitations on journalists and mass media in Ukraine. At this point they make
44 reference to popular 'political TV shows', where representatives of different
45 political parties carry out free discussion on most hot issues of political life in





Ukraine. However, in reality such shows represent certain political ideology that is oriented towards the redistribution of power (first by means of pre-term elections, then by means of formatting and reformatting the coalitions, and then by means of presidential elections). This phenomenon can be called 'façade democracy' or 'political carnival' where all the roles are clearly determined, and there are no vacant places within the audience.

Current political crisis in Ukraine cannot be explained only by reference to internal factors. There are some external factors that have contributed to the political turmoil in Ukraine. For instance, one should also take into account the existence of the pro-European and pro-Russian strategies of Ukrainian political elites. The period of 2005–2008 was marked by growth of 'Euroscepticism' in Ukraine. Surveys of the Ukrainian population reflect the gradual decrease in support for a pro-European orientation. Even within the pro-Western circles of the political elite in Ukraine which disliked the constrained (even somewhat cold) reaction of the European Union (EU) and Council of Europe (CoE) to the 'European initiatives' of the 'Orange government' there was growing concern that the EU and CoE had left Ukraine all alone with Russia. To support this opinion Russia has been increasing its influence on Ukraine using, first of all, the 'gas factor', forcing the political and business elites to doubt the necessity of a pro-European orientation, which means the loss of 'cheap energetic resources from Russia'. The integrated nature of business elites and political elites has caused economical pragmatism to dominate over democratic political and ideological values in Ukraine. Therefore the idea of the 'Euroasian identity' of Ukraine, which acknowledges the dominant geopolitical position of Russia, is gradually replacing the concept of 'European identity' in Ukraine.

Since 2004 Ukraine has been actively promoting its European aspirations. An institutional mechanism for approximating national legislation to the *acquis communautaire* was created. However in a time of sharp political confrontation (not only against the opposition, but also inside the ruling coalition), the 'Eurocentrism' of the Ukrainian political elite was taking shape. Despite the fact that Ukraine achieved some degree of success in approximating national legislation with the EU *acquis* it became further removed from the efficient enforcement of universally recognized democratic principles. The first concern was the so-called 'constitutional reform', which introduced the model of parliamentary republic in Ukraine in 2006.

External factors instigated further experiments on the improvement of the political system in Ukraine. For international and European actors (EU, CoE, Organization for Security and Cooperation in Europe (OSCE)) the 'come back' of 'kuchmism' and the strengthening of authoritarianism was real. That is why major international actors supported the dialogue with Ukraine and constitutional reforms to establish a parliamentary republic in Ukraine. However the final result was unexpected. In the end Ukraine did not start to approach the standards of European democracy, but only got further from them. The gap between political elites and the general population was growing, and political apathy and dis-





1 appointment among political elites and the population was increasing. The scope
2 of corruption reached surprisingly high levels, far beyond what happened in the
3 period of 'kuchmism'. As a result the Russian model of 'ruled democracy'
4 became a more and more attractive option for Ukrainian electorates.

5 Thus it can be stated that the current political crisis has sharpened the issue of
6 the quality of democracy in Ukraine, placing doubt over not only the effective-
7 ness of political institutions and procedures, but also any consequent internaliza-
8 tion of democratic standards. Since the early independence, the development of
9 democracy in Ukraine has been influenced by major international and European
0 actors (mainly the EU and CoE). Ukraine was looking at European democracy
1 standards for guidance. Below we shall endeavour to analyse the pace of the
2 'Europeanization' of the Ukrainian political system and the influence of interna-
3 tional and European actors on this process.

4 **Evolution of constitutionalism in Ukraine**

5 *Common European constitutional traditions and Ukrainian* 6 *constitutionalism*

7 The Ukrainian Constitution was born as a result of the prolonged constitutional
8 process, which started in the period of the Ukrainian early independence in
9 1990–1991. The evolution of constitutionalism in Ukraine was distinguished by
0 sharp political confrontations and different ideological orientations existing in
1 Ukrainian society at the time, and these found their way into a large number of
2 the drafts of the Ukrainian Constitution. The choice for decision makers was
3 rather simple: 'either to follow the way of creation of a Ukrainian model of
4 democratic social system (applied to countries of Eastern and Central Europe),
5 or to follow the way of liberalization and authoritarianism'.²

6 Ukrainian scholars frequently emphasize the existence of early domestic
7 constitutional traditions. It has become customary to mention the Philip
8 Orlyk's Constitution – the first written constitutional draft prepared in the
9 eighteenth century. It reflected the general picture of best constitutional ideas
0 and principles in Europe at that time. In the end of the nineteenth and begin-
1 ning of the twentieth century representatives of the Ukrainian intellectual elite
2 were influenced by the contours of modern European constitutionalism as the
3 'community of European traditions'. However, this influence was not sufficient
4 to accelerate political and democratic reforms in Ukraine. The Soviet Ukrain-
5 ian Constitution of 1978 was a combination of declarative (fictive) freedoms
6 and other elements of the authoritarian political regime of the 'ruling commu-
7 nist party'. The illusion that democratic traditions existed in the Soviet Ukraine
8 is quite widespread in the political culture of modern Ukraine. Furthermore,
9 this illusion was quite influential during the process of creating the new Con-
0 stitution in 1996.

1 One can underline the following sources that inspired the Ukrainian Constitu-
2 tion 1996:
3
4
5





- a romantic perceptions that it was possible to preserve certain elements of the Soviet constitutional system (such as the administrative and territorial system, system of local self-government on the basis of Councils, inclusion of social and economic rights etc.), and a distrust towards the market economy society, which resulted in the preservation of social rights (right to labour, right to sufficient level of life, right to accommodation etc.);
- b examples of constitutional reforms in Central and Eastern European countries (Hungary, Czech Republic, Poland, etc.);
- c constitutional ideas and provisions of 'old European democracies' (for example, the European Commission stated that the semi-presidential system of power to be implemented in Ukraine was in line with the French model, and the idea of the 'social state' was borrowed from the German Constitution);
- d values and specific positions of the basic CoE conventions, and also other international legal documents.

These sources, combined with the controversial objectives of opposing political elites, caused the eclectic and inconsistent nature of the Ukrainian Constitution 1996.

Most inconsistencies in the Ukrainian Constitution 1996 were caused by the system of distribution of powers. For the supporters of the 'renovated socialism' model, the president was supposed to become an instrument of preservation of the socialist social model. Thus, in this respect, the political regime looked like a compromise. However, this model was rather inconsistent. Actually, the president of Ukraine was the head of executive power. However, the Ukrainian Constitution 1996 itself did not confirm this status. The provision that the president of Ukraine is a guarantor of the Constitution and the head of executive power was rather unclear, taking into account the provision that the supreme institution within the executive is the Cabinet of Ministers of Ukraine. Like in other European post-socialist countries, one could observe a certain dualism in the organization of executive power, which created the preconditions for or the necessity even of an eventual transformation towards a parliamentary republic.

Reports of the sessions of the Constitutional Commission Working Groups (the body created by the parliament of Ukraine (Verkhovna Rada) in order to prepare the draft Constitution) in the course of 1992–1996 gives one a good picture of how European constitutionalism really influenced the nature of constitutional reform in Ukraine.³ These documents demonstrate the complicated nature of this influence, which occurred in two ways:

- a the inclusion of European ideas in the context of national discussions concerning the draft 1996 Constitution, in the framework of the activity of the Constitutional Commission;
- b the editing and monitoring of the constitutional process by the Venice Commission, which prepared several conclusions as to the Constitution drafts.⁴





Drafters of the Ukrainian Constitution 1996 were guided by two opposite motives. On the one hand, they were convinced that it was necessary to use the best European examples – including direct borrowing of provisions from the Constitutions of the ‘old democracies’. The thesis of the ‘European identity’ of Ukraine evoked a substantive political and academic discussion, but did not provide any alternative models to the borrowing one. On the other hand, change agents in Ukraine were convinced that ‘not only the Western part of Europe is the creator of the modern European constitutionalism’, and this implied the possibility of drafting a constitutional text which would not correspond to the best European traditions. It is important to mention that the issue of Ukraine’s membership in the CoE was not raised at all in the course of the activity of the Commission.

Monitoring reports of the Venice Commission became the only clearly determined legal and political instruments of influence in relation to the best European traditions and practices on the constitutional process in Ukraine.⁵ The attitude of some representatives of the Ukrainian political elites towards the conclusions of the Venice Commission was quite restrained at that time. When the draft Ukrainian Constitution was discussed at the sessions of the Constitutional Commission, one would quite often hear that ‘these are just Western experts, and we may not take their opinion into account’.⁶ In general, the Venice Commission has considerably influenced the improvement of certain provisions in the Ukrainian Constitution concerning the organization and realization of the principle of distribution of power, formation of the Verkhovna Rada and its structures, organization of judicial system, the Constitutional Court, protection of human rights, status of the Autonomous Republic of Crimea and some other provisions. In its conclusions, the Venice Commission gave quite a satisfactory assessment of the Ukrainian Constitution as a ‘contribution to the democratic culture of Europe’. Besides this, it also pointed out some problematic aspects. Among them, one should mention several factors, which influenced the nature of the Ukrainian Constitution:

- 1 it has been typical for post-socialist countries to attempt to provide an ‘extremely complete list of rights’ in the text of the Constitution without taking into account realities of their implementation and their judicial protection (first of all, social and economic rights), and there is also a vagueness about some human rights (for example, a lack of clarity in the prohibition of the death penalty, the possibility of limiting freedom of movement by an usual law and the absence of limitations for certain social rights etc.);
- 2 the unclear definition of competences of the Verkhovna Rada, the president and the Cabinet of Ministers with regard to the adoption of obligatory legal acts in Ukraine;
- 3 the ungrounded granting of the right of the legislative initiative to the president and the National Bank (taking into account that the Cabinet of Ministers has this right);
- 4 the strong dependence of the Cabinet of Ministers on the president when it is accountable to the Verkhovna Rada;





- 5 a lack of understanding of the necessity to simplify administrative and terri-
torial divisions inherited from the Soviet Union;
- 6 contradictions and inconsistency in the determination of the legal status of
the Autonomous Republic of Crimea;
- 7 unclear procedures and mechanisms for the functioning of local self-
government functioning.⁷

Constitutional reform in Ukraine: idea and consequences

The adoption of the new Ukrainian Constitution in 1996 coincided with the activation of dialogue between Ukraine and the CoE and the EU. It happened when Ukraine was declaring its intention to become a full EU member as a democratic country with a 'European identity'. There was a big temptation at that time to justify the idea of reforming the Constitution of Ukraine by encouraging political elites in Ukraine to react to recommendations of European institutions concerning an optimal parliamentary model for Ukraine. However, the idea of a parliamentary republic in Ukraine found growing support due to the attempts by President Kuchma to strengthen his own presidential powers. In 1999–2004, the European institutions (EU, CoE, OSCE) were included in the process of amending the Ukrainian Constitution of 1996. The Venice Commission drafted conclusions warning about possible risks that may appear during the realization of the procedurally unprepared reform of the Ukrainian Constitution.

Generally, the European factor played quite an important role in the constitutional process in Ukraine. However, it was the motivation of the main political elites that was crucial, which were guided exclusively by the logic of the fight for power. Ironically on the eve of elections of 2004 the slogan of reforming of the political system was taken up by the government of President Kuchma. Although used to claiming that a parliamentary republic would be harmful for Ukraine, President Kuchma made an about-turn and openly supported the parliamentary republic model for Ukraine.

The constitutional reform of Ukraine took final shape in December 2004 (corresponding changes to the Ukrainian Constitution of 1996 took effect starting from 1 January 2006) as the result of political compromise, which made it possible to hold a repeated second round of presidential elections and to resolve the conflict peacefully. All the institutional drawbacks of the new model resulted in a deep political crisis.

Constitutional changes shifted the balance of powers in the mixed system of administration in favour of the Verkhovna Rada. The first issue concerns the formation of the Cabinet of Ministers and control over its activity. However, the problems were created not by the new balance of powers, but rather by imperfect procedures, which had a critical role in the realization of this balance. The parliamentary majority was given significant powers by the constitutional reform of 2004. The Ukrainian Constitution, backed by the slogan of enhancing the political responsibility of parliamentary forces, granted huge authority to the coalition of parliamentary fractions, however the main procedures for their activities





were not regulated (formation, legitimating processes, dissolution, admittance and expelling of members, rights of separate deputies and the fractions' leadership). Simultaneously, it was not the position of the 'coalition' that was of crucial importance (the members of which were often just supernumerary persons), but rather the position of the key persons in the political elite, which maximized the approximation of the decision-making procedure to the oligarchic model.

The introduction of a proportional electoral system with closed party lists became an important element of the constitutional reform of 2004 negatively influenced electoral rights. The practice of forming electoral lists of people who were not in fact a part of party life resulted in numerous examples of personal doctors, drivers and bodyguards of representatives of political elites being included on the party list. An image appeared in the mass consciousness of the Verkhovna Rada as being the 'club of millionaires and their servants'.

Ukrainian political parties do not correspond to political parties in 'old democracies'. This is because in Ukraine powerful financial and industrial clans use political institutions for the creation of corresponding conditions in order to achieve their corporate interests. The 'supremacy of right' rhetoric has become an attribute of political leaders of the majority of parties. Certain authors admit that the use of the rhetoric of democratic values is a step towards the perception of these values. However, one can only partly agree with this. A part of the domestic political elites perceives the supremacy of right as the supremacy of law, and they use any formalities of the law for tactical purposes, cynically neglecting fundamental values – the realization of such values being the purpose for which these formalities were created.

The kernel of constitutional reform in 2004 can be summarized in the following way. It upset the division of power between the legislative and executive, and created a number of mixed constitutional arrangements:

- 1 a semi-legitimate situation for the coalition of parliamentary fractions in the Verkhovna Rada, the activity of which remained unregulated by legislation;
- 2 the separation of the functions of the head of the state from the executive;
- 3 two fractions within the Cabinet of Ministers, without providing the mechanisms for their interaction with the decision-making centres.

The consequence of the functioning of this political system has unavoidably led to political crises without any clear procedure of their resolution, the accumulation of extra-constitutional mechanisms and relations, and the deepening of the estrangement of the people from the power. The constitutional reform in 2004 led to a deterioration of the state of inter-institutional and electoral accountability in Ukraine. Coalitions of fragile parliamentary fractions formed governments which were not able to represent a unified political will of political elites in Ukraine. On many occasions, the judiciary in Ukraine was used by particular political forces for their own benefit. As a result the legislature, executive and judiciary were not able to monitor each other and ensure the correct functioning





of checks and balances between them. On the eve of presidential elections in 2010 leading political parties actively promote ideas of new constitutional reforms with diverging objectives (either presidential or parliamentary republics).

Relations between executive and legislative powers in Ukraine

A contemporary model of relations between legislative and executive power in Ukraine has resulted from political compromise during the 'constitutional reform' of 2004–2006. These changes were supposed to enhance not only the effectiveness of power, but also society's control over it on the basis of being able to clearly identify the subjects and form of power structures and also by placing on them the responsibility for the results of the activities of these structures. It was supposed that an important result of the reform would be the formation of close electoral and inter-institutional accountability between the will of citizens during the elections and the processes of the formation of executive power. However, in reality these purposes were never achieved.

The constitutional compromise was born in December 2004 with the direct involvement of the EU (EU High Representative H. Solana took a very active part in mediating the political crisis in Ukraine) on the eve of the unpredictable political confrontation (the 'Orange Revolution'). Unfortunately the EU did not directly influence the content of the constitutional compromise at that time due to the priority given to the objective of preventing political and social unrest in Ukraine.

Changes in the balance of power in 2006 shifted the authority in favour of the Verkhovna Rada. For instance, the president of Ukraine has lost most of his powers to appoint members of the executive while the Verkhovna Rada strengthened the guarantees of independence in legislative activity and (most crucially) acquired full authority as to the formation of the Cabinet of Ministers. The president of Ukraine still has some important constitutional powers which, however, cannot be realized without the involvement of the executive power. They are the guarantee of sovereignty and territorial unity of the country, the guarantee of citizens' rights and freedoms and the administration of foreign policies and relations. As a result, the more or less functioning system of a presidential republic was replaced by another system, which has been more unclear and inconsistent in its realization.

The most drastic changes occurred with regard to the Cabinet of Ministers, which turned from a body subordinated to the president into an autonomous body with significant authority limited only by a parliamentary control. The possibility of presidential control still remains, but it has a principally different nature now: the right to veto the legislative initiatives of the government and cessation of the effects of acts of the Cabinet of Ministers. In 2008–2009 where there was a split inside the 'democratic coalition' and sharpening of the personal confrontation between Yushenko and Tymoshenko, the institutional contradic-





tions of these two elements of executive power (president and prime minister) became the reason for sharp political conflicts, the resolution of which became impossible in the existing legal field.

The Constitutional Court of Ukraine, which could, at least theoretically, have become an arbitrator among branches of power in Ukraine, was limited to the consideration of disputes grounded on issues of constitutionality only, and it had to comply with a rather complicated formal procedure. In fact, the president of Ukraine allowed himself not only unconstitutional involvement in the authorities of Cabinet of Ministers in that period, but also he used institutions such as the Council of National Security and Defence and the Constitutional Court in political strategies aimed at discrediting the government.

However, reform could not create an effective system of inter-institutional accountability in Ukraine because numerous procedures were not regulated and not fixed either in the Constitution itself or in laws supporting its provisions.

The new Constitution of Ukraine granted considerable powers to the so-called 'coalition of parliamentary fractions', however it did not provide the main mechanisms for its formation, legitimating processes, dissolution, the admittance and expelling of members, rights of separate deputies and the fractions' leadership (with the exception of time limits of declaration and submission of the candidate for the prime minister of Ukraine). The fact of how the parliamentary majority should function after the government is formed is not mentioned at all. In the years 2007 and 2008 ideas were more than once declared that 'broad' or 'mega' coalitions uniting all the parliamentary fractions should be created, i.e. that the coalition should be replaced with situational units of political forces. Such declarations were evidence of a lack of any readiness amongst the political elites to work within the framework of the institutional model of power created by the constitutional reform. Thus, constitutional changes have led to a situation where the Verkhovna Rada of Ukraine lacks any kind of transparent procedure in relation to its formation and functioning. However, this very institution was granted key authorities in the field of state policy – not the least of which is the right to form the government.

Amendments to the Constitution of Ukraine in 2005 contained many contradictions concerning functioning of the Cabinet of Ministers. For instance, a majority of ministers could be appointed by the ruling coalition of the parliamentary fractions and a minority of ministers could be appointed by the president of Ukraine. Although the original intention of this system was to create a balance of power between the legislature and the president, it led to constant internal political conflicts in Ukraine. It could be argued that the constitutional reform in 2004–2006 engendered two centres of executive power in Ukraine – one is the president another is the prime minister. At the same time it did not provide any efficient cooperation between them because this system was underpinned by another destabilizing factor – the dependence of government activity on the parliamentary coalition.

The rationale behind current rules on appointment and functioning of the Cabinet of Ministers is also arguable. Currently, the government is formed on





situational grounds. To form the government of Ukraine the following is required: (a) the nomination of a prime minister by the coalition of parliamentary fractions in the Verkhovna Rada to the president of Ukraine; (b) approval of the nomination by the Verkhovna Rada with a simple majority of votes. At this point it is unknown what should be done if there are alternative nominations or if the president does not nominate a candidate for the Verkhovna Rada's consideration.

The parliamentary Coalition can be created upon the official nomination of the prime minister. In fact, the Cabinet of Ministers can start functioning as an independent body from this moment because in order to vote for its personal composition it is necessary to gain 226 out of 450 votes in the Verkhovna Rada. Moreover the parliamentary majority can be formed by using methods like bribery, blackmail, deceit and others. The competence of the president to disassemble the Verkhovna Rada is limited only by formal procedural methods: the observance of terms of formation of the Coalition and the Cabinet of Ministers, and the regular carrying out of plenary sessions. The Ukrainian Constitution leaves open issues typically encountered by governments of parliamentary republics, such as government dismissal in the case of the collapse of the coalition, which means that regulation remains, once again, up to specific corporate interests. In practice the Ukrainian case makes the flow of parliamentary votes so elusive that nobody, except for experts, would notice the collapse and even the creation of a new coalition (informal majority). Endless 'reformatting' of the majority, so typical of Ukrainian parliamentarism, differs significantly from the classic forms of Western democracies. Therefore a weak prime minister in Ukraine totally depends on the will of political and business elites, represented by party fractions in the Verkhovna Rada.

The model of executive power in Ukraine as it was established by the constitutional reform of 2004–2006 has provided quite a high level of formal effectiveness in the field of law drafting. The analysis of the situation of 2006 through to the beginning of 2007 demonstrates that the majority of the legislative drafts of the Cabinet of Ministers were adopted by the Verkhovna Rada. Almost 90 per cent of draft laws were adopted, contrary to the negative standing of the president and opposition, which were mostly blocked by the parliament majority. The only instrument of counteraction was the right to veto; however, the Verkhovna Rada used all means to overcome it.

The government of Ukraine had considerable success in harmonizing national legislation with the EU *acquis communautaire*. Quite an enhanced institutional model for assessing national legislation for its correspondence to the *acquis communautaire* was set up in Ukraine. There are quite striking statistics of the number of translations of EU acts and the number of drafts of legal acts (both laws and acts of Cabinet of Ministers and ministries) that were assessed, and the number of civil servants who were trained in EU law. However, in reality this looks rather like a 'Potyomkin's village' of 'Europeanization'.⁸ The romantic objective of the 'Europeanization' in Ukraine acquired rather bureaucratic and formal features. This is because the criteria of harmonization are reduced to a





simple textual correspondence of national legislation to EU acts. It is remarkable that almost 10 per cent of drafts submitted by the government for the approval by the Verkhovna Rada took into account the relevant provisions of EU *acquis*, and absolutely all law drafts were for compliance with EU law. The impact of European institutions on relations between the executive and legislature in Ukraine was limited due to never-ending political confrontations between these two branches of power. For instance, all presidential legislative initiatives to improve anticorruption legislation in line with standards of the CoE got the Verkhovna Rada's approval only as a result of a 'political quid pro quo' between the president and opposition on the one hand and the government and ruling coalition on the other. Later on, adoption of these drafts was blocked. It has become a general practice to ignore conclusions of European experts concerning legislative drafts.

The Constitutional Court of Ukraine

The establishment of the constitutional judiciary was a great novelty for Ukraine. In the opinion of the Venice Commission, the design of the Constitutional Court in Ukraine was greatly influenced by practices of post-socialist countries of Eastern and Central Europe, which were striving to have principally new courts which would be independent and which would safeguard newly acquired democratic values. In 1992 the first law on the Constitutional Court was adopted in Ukraine; however, the Constitutional Court was only set up in 1996.

The institutional framework of the Constitutional Court represents a balance between legislative, executive and judicial powers. The organization of judicial power in Ukraine is determined by its strict division into courts of general jurisdiction and the Constitutional Court, which is the only body with constitutional jurisdiction in Ukraine. This model corresponds to the organization of judicial power in Germany and France. Ukrainian lawmakers consciously preferred the European concept of constitutional judiciary at the stage of determination, regardless of rather active attempts on the part of American experts to prove the effectiveness of the American unified judicial model.

The model of authorities of the Constitutional Court of Ukraine is based on four categories of cases that may be considered by the Constitutional Court:

- 1 constitutionality of laws, acts of the president and the Cabinet of Ministers and also the Verkhovna Rada of Crimea;
- 2 correspondence of international agreements and treaties in effect brought to the Verkhovna Rada for approval under the Constitution of Ukraine;
- 3 observance of procedure in the impeachment of the president;
- 4 official interpretation of the Constitution and laws of Ukraine.

The subjects with the right to make constitutional submissions on these issues are:

- 1 the president of Ukraine;
- 2 no fewer than 45 members of the Verkhovna Rada;





- 3 the Supreme Court of Ukraine;
- 4 the Ombudsman;
- 5 the Verkhovna Rada of the Autonomous Republic of Crimea.

This model ensures that the Constitutional Court of Ukraine is an absolutely autonomous element in the judicial system and the only body with constitutional jurisdiction.

In order to assess the role of the Constitutional Court, it is important to determine the accessibility of constitutional legislation for physical and legal persons, paying special attention to the limitations of jurisdiction and subjects of application listed above. The procedure of 'constitutional application' in Ukraine gives a right of constitutional appeal to any physical and legal person in the following circumstances: (a) where provisions of the Constitution and laws are applied ambiguously by courts and public bodies and (b) such application infringes their rights. Analysis of the Constitutional Court's practice demonstrates that the number of such applications was constantly decreasing, because the Constitutional Court refused to initiate proceedings where it found there were no grounds for proceedings, taking into account the criteria listed above. Thus, this mechanism did not prove to be effective.

The main principle of the Constitutional Court's formation is equal (six judges for each) and representation of the three branches of power via nominations by the president, the Verkhovna Rada and the Council of Judges. In times of deep political crisis in Ukraine the dualism of the executive power has emerged (with the president and prime minister as competing political institutions). Consequently, doubt has been cast on the appropriateness of giving the right to appoint the judges of the Constitutional Court only to the president, because this does not correspond to the real balance of political elites and gives additional advantage to the president, which he can abuse for his own interests.

Ukrainian legislation on the status and competences of the Constitutional Court was thoroughly monitored by the European institutions (the Venice Commission, the EU). In general these recommendations were taken into account; however, certain drawbacks remained in place.⁹

Risks contained in the procedures of constitutional judiciary became apparent when the term of office for some of the constitutional judges expired in 2005 and the necessity of their replacement arose. This situation coincided with the sharpening of internal contradictions in Ukrainian political life in the context of discussions on the constitutional reform, when actually the function of the Constitutional Court as an independent arbitrator could be realized. However, instead of this, the activity of the Constitutional Court was blocked by political elites. Lack of regulation of the issue of judges' replacement meant that the Verkhovna Rada and the president could not fulfil their duty to replace the judges according to their quota for a long time, which was a result of the fact that the necessary quorum could not be reached. The political crisis of 2007–2008 demonstrated the fact that the constitutional reform had actually legitimized the 'party principle' in the formation of the Constitutional Court, though





1 formally judges belong to no party. New candidates for replacement were
2 selected exclusively by the party principle and quite soon (coinciding with the
3 consideration of a case on the constitutionality of a presidential decree) the
4 judges evidently demonstrated their party sympathies, with a clear division in
5 the Constitutional Court between the 'president's' and 'prime minister's' wings.
6 European institutions were worried by the situation of the Constitutional Court
7 of Ukraine, and their position was clearly demonstrated in the conclusions of the
8 Venice Commission. These related to possible constitutional and legislative
9 changes in order to provide non-stop functioning of the Constitutional Court of
0 Ukraine, which contained not only the wording of the problem, but also sug-
1 gested specific mechanisms for resolving the issue.¹⁰ However, in the conditions
2 of the political crisis, these recommendations were ignored and with perspective,
3 it is not likely that they will be realized in the near future.

4 An important factor of the Constitutional Court's activity is the quality of
5 judges. In the early period the majority of constitutional judges were judges of
6 domestic courts whose legal consciousness and values were formed in the frame-
7 work of the Soviet judiciary and on the bases of legal positivism. In 2004–2006
8 the majority of constitutional judges were replaced, and as a consequence of this,
9 this peculiarity only increased. Besides this, the role of 'judicial administrators'
0 also increased. For example, the ex-minister of justice who became a member of
1 the Constitutional Court, was investigated during the crisis of 2007 by the Secur-
2 ity Service of Ukraine for being in receipt of bribes worth multimillions. It was
3 very hard for constitutional judges to step away from the 'ritual' and declarative
4 usage of the principle of 'supremacy of law' to the realization of its spirit and
5 values. More than once it was declared in Ukraine that it is necessary to form the
6 Constitutional Court on the basis of other principles, which would increase its
7 creativeness and ensure the qualification of judges in line with the best Western
8 democratic and constitutional values.

9 During the period of 1997–2005 (before the 'functioning standstill' of the
0 Constitutional Court began) the Constitutional Court of Ukraine adopted 73
1 decisions as to the correspondence of Ukrainian legislative acts to the Constitu-
2 tion. In particular, around 200 legislative provisions were found unconstitutional.
3 However, the enforcement of decisions of the Constitutional Court of Ukraine is
4 far from being positive. In accordance with the Law of Ukraine 'On [the] Con-
5 stitutional Court', legal acts may be invalidated as soon as a relevant decision is
6 issued by the Constitutional Court. During the first years of functioning of the
7 Constitutional Court the Verkhovna Rada reacted expediently to these situations
8 by making corresponding and timely changes in the legislation. However, from
9 the end of 1990, the majority of decisions of the Constitutional Court have been
0 either ignored or not enforced at all. For example, the decision of the Constitu-
1 tional Court of Ukraine of 2 November 2004 was not enforced for two years.
2 Only at the end of 2006 were corresponding changes introduced to the Criminal
3 Code of Ukraine. The low level of enforcement of decisions of the Constitutional
4 Court is explained by the fact that judgments often do not contain clear guide-
5 lines regarding the method of enforcement.





The Constitutional Court of Ukraine can be regarded as the biggest recipient of international and European technical and expert assistance.¹¹ Subsequently, it has proved to be an undisputed champion among other courts in Ukraine in referring to international law and universally recognized principles in its decisions. In most cases these references relate to rules of international law regarding the protection of constitutional rights and freedoms: freedom of association, right to participate in public management, right to vote and to be elected, respect for private life, right to social protection, right for free medical assistance in public hospitals, freedom of trade union activities, right to a fair trial and others. The Constitutional Court of Ukraine justified these references by the fact that the ratification by Ukraine of fundamental international and regional (European Convention on Human Rights, ECHR) conventions conferred rights on Ukrainian citizens, foreigners and stateless persons to refer to international means of protecting their rights in case they are not adequately protected by the judiciary in Ukraine.¹² The Constitutional Court of Ukraine referred to various international legal sources in every third decision. In every second decision the Constitutional Court of Ukraine endeavoured to interpret provisions of the Constitution of Ukraine in line with best international and European legal standards.¹³

Ukrainian constitutional judges are in favour of more frequent and effective references to international law, and to ECHR and EU law, in order to ensure more effective protection of the constitutional freedoms of Ukrainian nationals. Furthermore, some judges of the Constitutional Court advocate the necessity of applying in their decisions more elements of the EU *acquis* owing to Ukraine's pro-European policies and its aspirations for EU membership.¹⁴

In most decisions taken by the Constitutional Court of Ukraine, EU law is applied as a persuasive source of reference. For instance in the course of comparative analysis the Constitutional Court referred to EC Regulation 2004/2003 'on the regulations governing political parties at European level and the rules regarding their funding',¹⁵ along with international conventions, ECHR law and European Court of Human Rights case law in its ruling on the constitutionality of Ukrainian law entitled 'On political parties in Ukraine'.¹⁶ Furthermore, the Constitutional Court of Ukraine referred to EC Council Directive 2000/78¹⁷ in its ruling on the constitutionality of Ukrainian laws 'On public service', 'Diplomatic service' and 'Local self governmental service' (case on the maximum retirement age for civil servants).¹⁸

Decentralization and regionalism

Ukrainian model of local self-government and its implementation

Creation of the Ukrainian model of local self-government started before the independence of Ukraine in 1991. In 1990 the Law of Ukraine 'On Local Councils of People's Deputies of Ukrainian SSR and Local Self-Government' was adopted, which ensured transformation of the existing system of local electoral





bodies into the bodies of actual local self-government. Formally, the majority of procedural and organizational features of the Soviet model of self-government remained unchanged, because of the illusion of a 'possibility of socialism renovation' at that time. In particular, this provided making 'non-public' those councils which were not recognized belonging to state executive power in the framework of the division of powers into three branches. This resulted in the 'exclusion' of local governments from executive power.

Further on, the problem of local self-government progressed in the context of sharp ideological counteraction in Ukraine. This was reflected in the existence of two models for the formation of local self-government, which were not of an exclusively doctrinal nature and reached beyond the limits of simple theoretic discourse. The first model (community) was grounded in the fact that there were natural rights of territorial unities which are realized in the municipal (local) government independent from the state. The second model (state) considered that the basis of local self-government was the principle of decentralization of power, i.e. delegation of certain authorities by state to non-state subjects – territorial communities and their elected bodies. Attitudes to these models may serve as an indicator of the influence of European traditions, because their kernel is the model of the decentralization of state power in line with the principle of subsidiary. In Ukraine, it was recognized and fixed in corresponding Ukrainian legislation (the Constitution of Ukraine, Laws of Ukraine 'On Local Self-Government' and 'On Local Public Administrations') that local councils are deprived from fulfilling functions of state (except for cases when such functions are delegated to them in accordance with a special procedure) and should concentrate on resolving exclusively questions of 'local importance'. This implied that in order to resolve issues of state importance locally, it is necessary to create corresponding local bodies of executive power, which would be included into the hierarchy of executive power headed by the president. An analysis of functions of bodies of local self-government demonstrates that their separation is unclear, ungrounded and contradictory, and that inter-institutional accountability does not function properly. Actually, the majority of self-government authorities are bodies of executive power.

Drawbacks of the model of local self-government in Ukraine are also concerned with budgetary powers which are conditioned by general peculiarities of the budget system of Ukraine: limits on the income of local budgets (local councils), their dependence on the right to distribution of state donations among the territorial communities vested to district and regional administrations, absence of financing for the execution of the delegated authorities of state and calculation of local budgets on the level of minimal social needs (i.e. social guarantees of the state).

When the model of local self-government was created, its similarity with the system of territorial organization of power was preserved, which was inherited from the Soviet system and grounded on three levels: basic (local councils in cities, towns and villages), district and regional. This differed significantly from the post-socialist countries of Europe, where the two-level structure dominated.





This model of self-government was created in Ukraine in the middle of the 1990s and it was preserved practically unchanged until the constitutional changes in 1996. The main problem in the relations between the central and local power is the existence of the dual model of regional administration, which is reflected in the fact that there are two types of regional administrative structures at the regional level. On the one hand, there are local elected bodies (councils at the basic level and also district and regional councils), which are elected, though they do not have corresponding executive bodies. On the other hand, there also exists local public administrations, which belong to the hierarchy of executive power and are subordinated directly to the president of Ukraine. This dualism creates a double subordination of local bodies of public executive power: both to the central bodies of executive power and to local representative bodies (councils). The existence of an institution of delegated authorities is certainly an explanation of this dual subordination; however, on the whole this creates ungrounded competition between the president and the government. Constitutional reform of 2004–2006 was supposed to separate the fields of influence of the president and the government within the executive power. In reality this did not happen because of the numerous procedural drawbacks of the new mechanism of power. The president remained the key element in the process of formation and control over the activity of local public administrations. The fact that the president and head of the government belonged to different political forces actually split the system of administration of the local level. In 2006–2007 this was a typical situation in many regions of Ukraine whenever there was a conflict between local councils and heads of local public administrations. In 2008–2009 institutional ineffectiveness of another kind was displayed in constant confrontations between the president and prime minister, when the president used his right to replace the heads of local state administrations without complying with the procedure of coordinating such actions with the government.

Traditional problems of local self-government were sharpened by the introduction of a proportional electoral system at the level of local elections in the framework of ‘constitutional reform’ (except for the elections to village councils and village heads) in 2006. This situation implied an increased centralism in the governing of the regions (especially on the level of regions and districts as the actual key levels of self-government), because very often local centres of parties carried out the party’s policy not taking into account specific local interests. Some elected deputies of local councils did not even live in the regions where they were elected. The transfer of political centralization to the local level broke the balance of relations between the population and local political elites, thus creating the basis for conflict.

Europeanization and changes in the model of self-government

Discussions of the idea of reforming the system of local self-government started in Ukraine shortly after the Constitution 1996 was adopted, and most actively pursued in political conflict between the president and the ‘democratic coalition’





in 2007–2009. The political opposition was standing for the transfer to a model of self-government that would provide real decentralization of the state administration and better inter-institutional accountability. Actually this was similar to the position of the European institutions.

One should mention three levels of influence of European standards on Ukrainian practice. The first one relates to the fact that Ukraine was included in the mechanisms of interaction, which were provided by the European Charter of Human Rights on local self-government and institutionalized on the basis of the CoE Congress of local and regional governments. Second, there is interaction between the EU and Ukraine, which in the present conditions is carried out in the framework of the European Neighbourhood Policy. Third, there are bilateral relations between the local governments of Ukraine and the CoE (having different status in relation to the EU). The peculiarities of each of the mechanisms are as follows:

- 1 Ukraine ratified the European Charter on local self-government (Charter) in 1997 having agreed to regular monitoring on behalf of the European institutions. In 1998–2001 an assessment of correspondence of Ukrainian legislation to the European model was held in the framework of the monitoring procedure of the CoE Congress of local and regional governments (Congress), which was reflected in two Recommendations as to the situation of local and regional self-government (Recommendation 102 (2001) and Recommendation 48 (1998)). The Congress stated that ‘Ukrainian government, when ratifying the Charter, evidently underestimated its importance and influence on political life’ which was reflected in the ‘deficit of democracy and supremacy of law on the level of local governments’. The following drawbacks of the Ukrainian model of self-government were mentioned: absence of clear separation of local self-government from regional and state executive power, absence of appropriate financial provisions to local government, lack of regulation of the municipal property issue, contradicting local and delegated authorities etc. In general, it was stated that there is a real need for the implementation of the Charter into national practice. These recommendations were used for the preparation of drafts for the reform of local self-government, however they were never realized.

- The reform of local self-government has become one of the top issues of the political dialogue between Ukraine and the CoE. This problem became especially sharp during the crisis of 2004–2008. The Recommendation of CoE Parliamentary Assembly 1,722 (2005) ‘On Fulfillment of its Duties and Obligations by Ukraine’ underlined the necessity to intensify the program of collaboration with the purpose to assist the bodies of Ukrainian government to implement the Charter in order to increase the development of local democracy in Ukraine (regarding both the normative regulation and education of local self-government servants).
- 2 The problem of local self-government in Ukraine was represented quite significantly in the framework of the EU–Ukraine relations which set up





- numerous EU programmes for financing educational and informational projects on sharing the experience of European countries with the 'Ukrainian municipal movement'. A specific direction of the collaboration was the trans-border cooperation. During 2004, the European Commission presented the programmes of small Europe Aid projects on frontier collaboration, which were mainly of an economical nature. After 2006, a number of 'neighbourhood programmes' were initialized in the framework of Western European programmes INTERREG (interregional cooperation programme(s) funded by the European Union), which also aimed at the reduction of general tension on the frontier (fight against crime, illegal migration etc.). All these programmes were based on a pragmatic approach by the EU to the security of their own frontiers. They had only indirect influence on the processes of democratization and changes in the system of local self-government, especially taking into account the minor financing of these programmes.
- 3 In the Soviet period, local councils of cities and regions of Ukraine had close bilateral connections with the cities and regions of Eastern and Central Europe. These connections developed most actively with Poland, receiving financial assistance from the Polish government. Totally, now more than 180 cities and towns and regions of Ukraine have constant bilateral connections with the EU member states. These connections have become an important channel for sharing the examples of realization of the European decentralization model.

Ombudsman

The office of Ombudsman is principally new for Ukraine because it never existed in the Soviet Union. This fact somehow explains a rather long period for its establishment in Ukraine. The issue of establishing the office of Ombudsman in Ukraine caused considerable political debate at the time of drafting the Constitution of Ukraine before 1996. One part of the political elite believed that functions of the Ombudsman as to the protection of human rights could be performed by the prosecutor's office.¹⁹ The other part of the political elite wholeheartedly supported the establishment of the office of Ombudsman (the Verkhovna Rada commissioner on human rights) as a compulsory institution inherent to democratic regimes. The fundamentals of the legal status of the Ombudsman are fixed in the Constitution of Ukraine and in the Law of Ukraine 'On Verkhovna Rada Commissioner on Human Rights' (23 December 1996).

According to the Ukrainian model the Ombudsman's office is accountable to the Verkhovna Rada over the observance and protection of human rights in Ukraine. The main requirements of the Ombudsman's office (besides the universal requirements as to public officials in the governmental bodies) are his/her independence, that he/she may belong to no political party and may not combine the functions of the office with other types of activity (except for education and research). The Ombudsman is elected by the Verkhovna Rada upon the proposal of the head of the Verkhovna Rada or no less than one-quarter of members of





1 the Verkhovna Rada. Since 1999, the Ombudsman has had a rather high status in
2 the system of supreme public officials, equal to that of the head of the Constitu-
3 tional Court of Ukraine.

4 The competences of the Ombudsman include the consideration of applica-
5 tions of individuals on human rights infringements (made no more than one year
6 after the infringement), and also the applications of members of the Verkhovna
7 Rada. The Ombudsman can also initiate proceedings on his/her own initiative.
8 Simultaneous proceedings cannot be initiated regarding infringements that are
9 being considered by other courts. The law contains a rather detailed regulation
0 of proceedings for such cases granting significant authorities to the Ombudsman
1 in his relations with state bodies. It is worth mentioning that the excessively
2 declarative nature of these provisions and a lack of clear procedure for collabo-
3 ration between the Ombudsman and state bodies was reflected in the situation of
4 negotiation with the Somali pirates who captured the Ukrainian ship *Fayina* in
5 2008. According to the minister of foreign affairs, the actions of the Ombuds-
6 man represented harm rather 'than favour [in] the negotiation process'.

7 Results of constitutional proceedings (considerations of applications from
8 individuals) show that the Ombudsman's office usually either directs applica-
9 tions concerning the unconstitutional nature of legal acts to the Constitutional
0 Court of Ukraine or files a requirement to eliminate the infringement to the state
1 bodies. The law provides that all infringements of human rights have to be elimi-
2 nated in the course of one month after a formal complaint of the Ombudsman's
3 office. However, neither the law on the Ombudsman, nor any other laws, contain
4 provisions on responsibility for the non-fulfilment of Ombudsman's applications
5 and requirements, or methods of their fulfilment. This makes the Ombudsman's
6 complaints rather ineffective and declarative. There is no exhaustive information
7 on the effectiveness of the Ombudsman's complains in Ukraine. During the
8 entire period of the Ombudsman's office activity in Ukraine (1997–2009),
9 almost 850,000 applications were submitted by Ukrainian nationals to it.
0 According to the Ombudsman's office reports 77,000 applications were received
1 (among them 21,000 were written applications) in 2007.²⁰ However the Ombuds-
2 man's office made only 38 appeals to the corresponding bodies of state and local
3 power, the majority of which concerned individual situations of human rights
4 infringements, and, according to the estimations of Ukrainian human rights
5 organizations, did not have strategic importance in eliminating systematic draw-
6 backs in legislation and its application in practice.

7 The Ombudsman's office is very often defined as a 'decorative element' in
8 the system of human rights protection in Ukraine. This can be explained not only
9 by the drawbacks of the institutional status of Ombudsman, but also by some
0 subjective factors. During the political crisis of 2004–2007 the situation with the
1 Ombudsman's office became especially sharp when the Ombudsman issue
2 ranked high in the political context. With two terms of service, the current
3 ombudsman, Nina Karpachova, openly infringed the principle of independence
4 and impartiality when she agreed to be included in the electoral list of the Party
5 of Regions, and during spring to autumn 2006 she was also a member of the





Verkhovna Rada. Representatives of the democratic elite had doubted the ability of Ms Karpachova to share democratic values, taking into account her critical speeches in 1999–2002 concerning the ‘double standards of the Council of Europe’ – which was essentially her indirectly supporting President Kuchma’s regime. In January 2007 before the elections of the Ombudsman in Ukraine the CoE Parliamentary Assembly directed a letter to the head of the Verkhovna Rada on the impossibility of electing a person who is not politically neutral, as the Ombudsman. However, this letter was not taken into account, and the parliamentary majority elected Ms Karpachova as a ‘possibility to gain control over another political institution’.²¹

An analysis of the international activities of the Ombudsman’s office in Ukraine gives us no idea as to the existence of any connection between this institution and the real implementation of EU democratic standards in Ukraine. The Ombudsman’s office in Ukraine enjoys a developed system of European connections, and contacts with national ombudsmen are constant and manifold. The Ombudsman’s office is also active in the framework of the European ombudsman’s network, and takes part in the majority of its activities. However this is mostly formal, ‘ritual’ activity that does not considerably influence Ukrainian legislation and practice.

Concluding remarks

In this chapter we have undertaken two tasks. First, we have sought to present the state of democratic and institutional reforms in Ukraine since its independence in 1991. We have suggested that Ukraine has completed a successful transformation from a communist regime to a ‘hybrid democracy’ model. High hopes were placed on the ‘Orange Revolution’ as a means of ensuring the further transformation to a Western style democracy. However these hopes have not been fulfilled due to continuing political instability in Ukraine and the struggle between change agents and veto players. Second, we have reviewed institutional reforms in Ukraine in areas of executive, judiciary (Constitutional Court), local self-government, protection of human rights (Ombudsman). Our analysis shows that all these institutional frameworks have been considerably reformed and influenced by European institutions (EU, CoE, OSCE). However these changes did not contribute to overall institutional stability and inter-institutional accountability in Ukraine. Thus, an institutional focus enables us to link the issue of the ‘Europeanization’ of Ukrainian constitutional and institutional structures with the effectiveness of international technical assistance to Ukraine. In many cases international and European financial and technical support focused on the adoption and implementation of laws and standards, omitting the issues of effective functioning and judicial activism.

Our overview shows that the Constitutional Court of Ukraine – in spite of remaining the most progressive branch of the judiciary in Ukraine – became paralysed by the political struggle of the political elites. The executive and legislative are in a constant political struggle in the Verkhovna Rada, and the





1 functionality of the ruling coalition is questionable. The office of Ombudsman
2 has not been able to maintain its credibility among political elites and the
3 general population. Also it was not able to cope with the increasing flow of
4 applications from Ukrainian nationals and has therefore been unable to effect-
5 ively protect their interests and rights before the government and other state
6 institutions.

7 We conclude with the suggestion that the process of ‘Europeanization’ has
8 encountered many difficulties and challenges in Ukraine. However, this does not
9 mean that the democratic transformation of Ukraine is doomed to fail. Reinvig-
0 oration of international and European efforts to ensure the ‘Europeanization’ of
1 Ukrainian society through the promotion of European common values and their
2 effective functioning would contribute to the strengthening of democracy and
3 the rule of law in Ukraine.

4 The state of inter-institutional accountability (within the domains of constitu-
5 tionalism, executive and legislative powers, decentralization and regionalism and
6 the Ombudsman) should be considered as moderate. Political power struggles
7 and focus on party interests have relegated the values of the constitutional reform
8 in 2004–2006. Examples of the ‘Constitutional Court standstill’ in 2005–2006
9 and the inability of the Ombudsman Nina Karpachova to stay neutral from active
0 politics show that despite considerable legislative and constitution changes in the
1 aftermath of the ‘Orange Revolution’ there was only very moderate improve-
2 ment in inter-institutional accountability in Ukraine.

3 The EU has been actively involved in constitutional and institutional changes
4 in Ukraine by providing regular monitoring and financial and technical assist-
5 ance to Ukraine. One of the most successful examples of the EU’s impact on
6 branches of power in Ukraine is the judiciary. The EU offers considerable finan-
7 cial and technical assistance for the reform of the Ukrainian judiciary in line
8 with EU best standards through the European Neighbourhood Partnership Instru-
9 ment. Only in the period 2007–2010 does Ukraine expect to obtain €494 million
0 for the implementation of the EU–Ukraine Action Plan, including the strength-
1 ening of the independence and effectiveness of the Ukrainian judiciary. The EU
2 funds projects to enhance the capacities of the Ukrainian judiciary and law
3 enforcement bodies in international cooperation in criminal matters, and to set
4 up a European Policy legal advice centre. The EU persistently encourages
5 Ukraine to intensify cooperation with the CoE, OSCE and other international
6 institutions in combating corruption (for instance, joining the CoE’s Group of
7 States against Corruption).

8 The EU’s attempts to reform the Ukrainian judiciary have achieved some
9 degree of success. The Ukrainian court system now enjoys better transparency
0 and information support (establishing administrative courts, the creation of an
1 electronic database of all national court decisions). The Ukrainian judiciary and
2 law enforcement institutions have entered into an active cooperation with EU
3 agencies such as EuroJust and FRONTEX. However, these changes have not
4 helped to change the reputation of the Ukrainian judiciary as one of the most
5 corrupt institutions in the country. EU experts warn that the Ukrainian judiciary





faces serious problems in the quality and substance of the legal training of its judges, as well as their regular professional training and funding. As a result, judicial decisions in Ukraine do not always comply with rule of law standards, and are often based on arbitrariness.²²

Therefore it could be concluded that the EU's attempts to reform and 'Europeanize' political and state systems in Ukraine is not a success story. However, it could be a success in the long term. The EU's means of influence via regular monitoring and offering technical and financial assistance have led to a degree of positive improvement but have not achieved all of its objectives. There could be several reasons for this. One reason is the very weak system of incentives for Ukrainian political elites that is offered by the EU. Until there is no prospect of full EU membership it would be wrong to expect any serious changes within the Ukrainian political system. Another reason is the constant political turbulence in Ukraine caused by the shift to the parliamentary republic system. It proved to be a key factor for instability in Ukraine. One cannot expect drastic improvements without first solving these problems in Ukraine.

Notes

- 1 Offe 1996: 867.
- 2 Golovaty 1997.
- 3 Ibid.
- 4 Constitutional Referendum in Ukraine: Opinion Adopted by the Commission at its 42nd Plenary Session in Venice, 31 March 2000, Doc CDL-INF (2000) 011. Opinion on three Draft laws proposing Amendments to the Constitution of Ukraine adopted by the Venice Commission at its 57th Plenary Session in Venice, 12–13 December 2003, Doc CDL-AD (2003) 019. Opinion on the amendments to the Constitution of Ukraine adopted on 8 December 2004 adopted by the Commission at its Plenary Session in Venice, 10–11 June 2005, Doc CDL-AD (2005) 015.
- 5 Ibid.
- 6 Golovaty 1997.
- 7 Opinion on the Constitution of Ukraine, adopted by the Commission at its 30th Plenary Meeting in Venice, 7–8 March 1997, Doc.CDL-INF (97)2, Strasbourg, 11 March 1997, pp. 12–28.
- 8 Jacoby 1999.
- 9 See Note 4.
- 10 Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, adopted by the Venice Commission at its Plenary Session, Venice, 9–10 June 2006, Strasbourg, 2006.
- 11 Judges of the Constitutional Court of Ukraine are regular visitors to international tribunals, European constitutional courts and participants in international and European professional and academic events. The Constitutional Court of Ukraine pursues active cooperation with the CoE, EU, Venice Commission and other international organizations. More information online, available at: www.ccu.gov.ua/en/index (last accessed 20 June 2009).
- 12 For instance, Decisions of the Constitutional Court of Ukraine of 14 November 2001 (domicile registration case) No. 15/2001 and (tax deposit guarantee case, No. 2/2005 of 24 March 2005).
- 13 Selivon 2003.
- 14 Kampo 2007.





- 15 Regulation 2004/2003 of the European Parliament and the Council, of 4 November 2003 'On the regulations governing political parties at European level and the rules regarding their funding' (O.J. L297).
- 16 Decision of the Constitutional Court of Ukraine of 12 June 2007, No. 2/2007.
- 17 EC Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (O.J. 2000 L303/16).
- 18 Decision of the Constitutional Court of Ukraine of 16 October 2007, No. 8/2007.
- 19 See Note 4.
- 20 Information online, available at: www.ombudsman.kiev.ua (last accessed 20 June 2009).
- 21 Information online, available at: <http://elections.unian.net/ukr/news/news-179462.html> (last accessed 10 September 2009).
- 22 See 'The Rule of Law in Ukraine', Report by Sir Brian Neill and Sir Henry Brooke (The Slynn Foundation) of December 2008, online, available at: www.britishukrainiansociety.org/en/index2.php?option=com_content&do_pdf=1&id=171 (last accessed 20 June 2009). In particular, the Report puts forward the idea that arbitrary judicial decisions by Ukrainian judges are explained by a lack of guidelines from higher courts and a preference to apply procedural law over substantive law in their judgments.

